Petroliam Nasional Bhd (PETRONAS) v Comptroller of State Sales Tax, Sarawak & Ors

HIGH COURT (KUCHING) — KCH-13NCvC-8/11 OF 2019
AZHAHARI KAMAL J
13 MARCH 2020

Civil Procedure — Judicial review — Application for — Applicant applied for judicial review to seek declaration that Sales Tax Ordinance, State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 and reg 19C of Sarawak State Sales Tax Regulations 1998 was unconstitutional and void — Whether declaratory relief sought by applicant fell within court jurisdiction — Whether applicant correctly named the party for declaratory relief — Whether applicant entitled for an order of certiorari to quash notice of assessment issued by first respondent to applicant — Whether the acts of first respondent were irrational, unreasonable or disproportionate — Whether entire ownership in and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in applicant — Sales Tax Ordinance — State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 — Sarawak State Sales Tax Regulations 1998 reg 19C

Pursuant to the State Sale Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018, the State Government of Sarawak ('the second respondent') imposed sales tax of 5% for 'sale or delivery to any person outside the state of Sarawak' on petroleum product specified therein effective from 1 January 2019. Pursuant to the said order, the first respondent, vide a notice dated 29 August 2019 ('the first notice'), adjudged and assessed sale tax payable in respect of crude petroleum oil, liquefied natural gas and condensates for the period between 1 January 2019–30 June 2019 amounting to RM1,208,100,690.49 and demanded payment thereof within 30 days from the date of the first notice. Subsequently, the first respondent issued another notice dated 7 October 2019 ('the second notice') adjudging and assessing the sales tax payable in respect of crude petroleum oil, liquefied natural gas and condensates for the period between 1 July 2019–31 August 2019 amounting to RM141,441,205.75 and demanded payment thereof within 30 days from the date of the second notice. Aggrieved with the said decision, the applicant challenged it by way of judicial review. The applicant sought for a declaration on the constitutionality of the state law, that Sales Tax Ordinance, State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 and reg 19C of the Sarawak State Sales Tax Regulations 1998 and for certiorari against the act of the first respondent. The applicant raised two preliminary

objections, firstly encls 34 and 38 on the ground that the state legal officer was not empowered to affirm the affidavit on behalf of the respondents; and secondly on encls 39 and 40 on the ground that the affidavits were filed in bad faith and were an abuse of process. The issues for the determination were: (a) whether the declaratory relief sought by the applicant fell within the court jurisdiction; and (b) whether the applicant had named the correct party for the declaratory relief. The applicant also contended that the acts of the first respondent were irrational, unreasonable or disproportionate. The applicant further contended that pursuant to s 1 of the Petroleum Development Act 1974 ('the PDA'), the entire ownership in and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in the applicant.

Held, dismissing the application:

(1) Section 24(1) of the Government Proceeding Act 1956 ('the GPA') did not state clearly whether appearance of law officer in a civil proceeding by or against the government in included the authority to affirm an affidavit. The purposive interpretation should be applied to determine the scope of the authority. A state legal officer was allowed to represent the government in any civil proceedings in all level of courts in the country. As such, they should have an equal standing with any advocate, within the meaning of Sarawak Advocate Ordinance (Cap 10) or the Legal Profession Act 1976. It was trite that a solicitor might affirm an affidavit on behalf of a litigant subject to conditions. The authority should also be extended to any state legal officer. Section 24(1)(b) of the GPA must include the authority to affirm an affidavit, subject to condition including there was no affirmation on any contentious matter. The matter deposed by the deponent was well within the deponent's personal knowledge and did not contravene the general restriction under O 41 r 5 of the Rules of Court 2012 (see paras 8–9).

(2) There was no direction to limit the number of affidavit to be filed by the applicant and respondents. It would be unjust if the objection was allowed. In the circumstances, the preliminary objections raised by the applicant were overruled (see para 11).

(3) It was clear that the crux of the declaratory order by the applicant went directly to challenge the power of the State Legislature in passing the impugned section of the State Sales Tax Ordinance. The challenge fell under art 4(3)(b) of the Federal Constitution and pursuant to cl (4) of art 4, the challenge must be commenced with the leave of the judge of the Federal Court. The applicant did not obtain the leave before commencing the application. The court had no jurisdiction to grant the declaration sought for (see paras 37–38).

(4) It was not disputed that the State Sales Tax (Taxable Goods and Rate of Tax)(Amendment) (No 2) Order 2018 and reg 19C of the Sarawak State Sales Tax Regulations 1998 were made by the Majlis Mesyuarat Kerajaan Negeri ('MMKN'). The MMKN was the decision maker for the purpose of the relief. The state government was not synonymous with the MMKN and the failure to name MMKN in the judicial review meant that the correct decision maker was not before the court. The failure was fatal to the applicant's case and the declaratory orders sought should be dismissed (see para 39).

(5) The power of the State of Sabah and Sarawak under art 95B(3) was independent of the limitation under art 74(2). The power of the two states to make law imposing sales tax was only subjected to the restrictions as provided under paras (a) and (b) of art 95B(3). The power of the State Legislature of Sabah and Sarawak to make law imposing sale tax was not meant to be confined to the matters enumerated in the state list. As such, the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 was constitutional and valid (see paras 57–58).

(6) The power of the state legislation to enact the State Sales Tax Ordinance came with the power to make provisions to spell out the mechanism upon which that law might be implemented. This would include the power to in define the word sale or stipulating the date when the sale tax was due or when the sale took place. It would enable the state to exercise its power within the authority of the law. In the absence of the definition of sale under the constitution, the extended meaning of the word 'sale' found in s 2 of State Sales Ordinance had the force of law. There was no basis for the court to rule that the definition was unconstitutional (see paras 63 & 65).

(7) The first respondent had shown that the amount of tax payable imposed on the applicant was not arbitrary. It was based on reliable data from the port in Bintulu and Miri. The respondent had made it clear that it would make supplementary assessment under s 21(6) of the State Sales Tax Ordinance. In fact, no protest was made by the applicant on the issuance of the notices. In the circumstances, the allegation that the first respondent's act was tainted with irrationality, unreasonableness and illegality was not proven. There was no mala fide on the part of the respondent in issuance the notices (see paras 72–73).

(8) Insofar as the ownership of petroleum in Sarawak was concerned, there was no express provision in PDA that the applicant was exempted from complying with any written law including state law. It was not the intention of the Parliament to accord the applicant with any special status in relation to its operation in Sarawak. Its ownership on petroleum under s 2 of the PDA was not without qualification and they were bound by any

State law passed by the State Legislature, including the State Sales Tax Ordinance. As such, the applicant's contention must fail (see paras 78 & 81).

[Bahasa Malaysia summary

Berdasarkan Perintah Cukai Jualan Negeri (Jumlah Nilai Jualan Barang Bercukai) (Pindaan) (No 2) 2018, Kerajaan Negeri Sarawak ('responden kedua') mengenakan cukai jualan sebanyak 5% untuk 'jualan atau penghantaran kepada mana-mana orang di luar negeri Sarawak' terhadap produk petroleum yang dinyatakan di dalamnya berkuatkuasa mulai 1 Januari 2019. Berdasarkan perintah tersebut, responden pertama, melalui notis bertarikh 29 Ogos 2019 ('notis pertama'), menilai dan menaksirkan cukai jualan yang perlu dibayar berkaitan minyak petroleum mentah, gas asli cecair dan mampat bagi tempoh antara 1 Januari 2019–30 Jun 2019 berjumlah RM1,208,100,690.49 dan menuntut pembayarannya dalam tempoh 30 hari dari tarikh notis pertama. Lanjutan itu, responden pertama mengeluarkan notis lain bertarikh 7 Oktober 2019 ('notis kedua') menilai dan menaksirkan cukai jualan yang perlu dibayar berkaitan dengan minyak petroleum mentah, gas asli cecair dan mampat untuk tempoh antara 1 Julai 2019–31 Ogos 2019 berjumlah RM141,441,205.75 dan menuntut pembayarannya dalam tempoh 30 hari dari tarikh notis kedua. Terkesan dengan keputusan tersebut, pemohon mencabarnya melalui semakan kehakiman. Pemohon memohon satu deklarasi terhadap perlembagaan undang-undang negeri, bahawa Ordinan Cukai Jualan, Cukai Jualan Negeri (Jumlah Nilai Jualan Barang Bercukai) (Pindaan) (No 2) 2018 dan peraturan 19C Peraturan-Peraturan Cukai Jualan Negeri Sarawak 1998 dan untuk certiorari terhadap tindakan responden pertama. Pemohon mengemukakan dua bantahan awal, pertama berdasarkan lampiran 34 dan 38 atas alasan bahawa pegawai undang-undang negeri tidak diberi kuasa untuk mengikrarkan afidavit bagi pihak responden; dan kedua berdasarkan lampiran 39 dan 40 dengan alasan bahawa afidavit tersebut difailkan dengan niat jahat dan merupakan penyalahgunaan proses. Isu-isu untuk ditentukan adalah: (a) sama ada relif deklarasi yang dimohon oleh pemohon berada dalam bidang kuasa mahkamah; dan (b) sama ada pemohon telah menamakan pihak yang tepat untuk relif deklarasi tersebut. Pemohon juga berpendapat bahawa tindakan responden pertama adalah tidak rasional, tidak masuk akal atau tidak wajar. Pemohon selanjutnya berpendapat bahawa berdasarkan s 1 Akta Kemajuan Petroleum 1974 ('AKP'), seluruh pemilikan dan hak eksklusif, kuasa, kebebasan dan hak istimewa untuk meneroka, mengeksploitasi, mengambil dan mendapatkan petroleum, darat dan luar pesisir Malaysia seharusnya terletak pada pemohon.

Diputuskan, menolak permohonan:

(1) Seksyen 24(1) Akta Prosiding Kerajaan 1956 ('APK') tidak menyatakan dengan jelas sama ada kehadiran pegawai undang-undang dalam

prosiding sivil oleh atau terhadap kerajaan termasuklah kuasa untuk mengikrarkan afidavit. Tafsiran bertujuan harus diterapkan untuk menentukan skop kuasa tersebut. Seorang pegawai undang-undang negeri dibenarkan untuk mewakili kerajaan dalam setiap prosiding sivil di semua peringkat mahkamah di negara ini. Oleh itu, mereka hmemiliki kedudukan yang sama dengan mana-mana peguamcara, dalam erti kata Ordinan Peguambela Sarawak (Cap 10) atau Akta Profesion Undang-Undang 1976. Ia adalah wajar bagi peguamcara untuk mengikrarkan afidavit bagi pihak yang dilitigasi dengan syarat. Kuasa tersebut juga harus diperluas kepada mana-mana pegawai undang-undang negeri. Seksyen 24(1)(b) APK harus memasukkan kuasa untuk mengikrarkan afidavit, tertakluk kepada syarat termasuk tidak ada pengataan mengenai perkara yang dipertikaikan. Perkara yang diikrarkan oleh deponen berada dalam pengetahuan peribadi deponen dan tidak bertentangan dengan sekatan am di bawah A 41 k 5 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 8–9).

(2) Tidak ada sebarang arahan untuk mengehadkan jumlah afidavit yang harus difailkan oleh pemohon dan responden. Tidak adil sekiranya bantahan tersebut dibenarkan. Dalam keadaan tersebut, bantahan awal yang dikemukakan oleh pemohon ditolak (lihat perenggan 11).

(3) Ianya jelas bahawa intipati perintah deklarasi oleh pemohon adalah secara langsung untuk mencabar kuasa Badan Perundangan Negeri dalam meluluskna seksyen yang dipertikaikan dalam Ordinan Cukai Jualan Negeri. Bantahan tersebut termasuk dalam perkara 4(3)(b) Perlembagaan Persekutuan dan berdasarkan klausa (4) perkara 4, bantahan tersebut harus dikemukakan dengan kebenaran oleh hakim Mahkamah Persekutuan. Pemohon tidak mendapat kebenaran sebelum mengemukakan permohonan. Mahkamah tidak mempunyai bidang kuasa untuk membenarkan deklarasi yang dipohon (lihat perenggan 37–38).

(4) Ianya tidak dipertikaikan bahawa Perintah Cukai Jualan Negeri (Jumlah Nilai Jualan Barang Bercukai) (Pindaan) (No 2) 2018 dan peraturan 19C Peraturan-Peraturan Cukai Jualan Negeri Sarawak 1998 digubal oleh Majlis Mesyuarat Kerajaan Negeri ('MMKN'). MMKN adalah pembuat keputusan bagi tujuan relif tersebut. Kerajaan negeri tidak sinomin dengan MMKN dan kegagalan menamakan MMKN dalam semakan kehakiman bermaksud bahawa pembuat keputusan yang betul tidak berada di hadapan mahkamah. Kegagalan tersebut adalah teruk kepada kes pemohon dan perintah deklarasi yang dipohon harus ditolak (lihat perenggan 39).

(5) Kuasa Negeri Sabah dan Sarawak di bawah perkara 95B(3) adalah bebas daripada had di bawah perkara 74(2). Kuasa kedua-dua negara untuk menggubal undang-undang bagi pengenaan cukai jualan adalah

tertakluk kepada had ssebagaimana yang diperuntukkan di bawah perenggan (a) dan (b) perkara 95B(3). Kuasa Badan Perundangan Negeri Sabah dan Sarawak untuk menggubal undang-undang bagi pengenaan cukai jualan tidak dimaksudkan untuk dihadkan kepada perkara-perkara yang disenaraikan dalam senarai negeri. Oleh yang demikian, Perintah Cukai Jualan Negeri (Jumlah Nilai Jualan Barang Bercukai) (Pindaan) (No 2) 2018 adalah berperlembagaan dan sah (lihat perenggan 57–58).

(6) Kuasa Badan Perundangan Negeri untuk menguatkuasakan Ordinan Cukai Jualan Negeri bersama dengan kuasa untuk menggubal peruntukan dalam menjelaskan mekanisme di mana undang-undang tersebut dapat dilaksanakan. Ini termasuk kuasa untuk memberikan definisi perkataan jualan atau menetapkan tarikh apabila cukai jualan terakru atau apabila jualan tersebut dijalankan. Ini akan memudahkan Negeri untuk menggunakan kuasanya dalam batas perundangan. Sekiranya tidak ada definisi jualan di bawah perlembagaan, makna lanjutan perkataan 'jualan' yang terdapat dalam s 2 Ordinan Cukai Jualan Negeri mempunyai kekuatan undang-undang. Tidak ada asas bagi mahkamah untuk memutuskan bahawa definisi tersebut adalah tidak berperlembagaan (lihat perenggan 63 & 65).

(7) Responden pertama telah menunjukkan bahawa jumlah cukai yang perlu dibayar kepada pemohon bukanlah secara rawak. Ia adalah berdasarkan data yang boleh dipercayai dari pelabuhan di Bintulu dan Miri. Responden telah menyatakan dengan jelas bahawa ia akan membuat penilaian tambahan berdasarkan s 21(6) Ordinan Cukai Jualan Negeri. Sebenarnya, tidak ada sebarang bantahan yang dibuat oleh pemohon mengenai pengeluaran notis tersebut. Dalam hal itu, dakwaan bahawa tindakan responden pertama dicemari dengan tindakan tidak rasional, tidak masuk akal dan tidak wajar tidak dapat dibuktikan. Tidak ada niat curang di pihak responden dalam pengeluaran notis tersebut (lihat perenggan 72–73).

(8) Sejauh mana pemilikan petroleum di Sarawak bersangkutan, tidak ada peruntukan yang jelas dalam AKP bahawa pemohon dikecualikan dari mematuhi undang-undang bertulis termasuk undang-undang negeri. Ia bukanlah niat Parlimen untuk memberikan status istimewa kepada pemohon berhubung dengan operasinya di Sarawak. Pemilikannya atas petroleum di bawah s 2 AKP bukan tanpa kelayakan dan mereka terikat dengan undang-undang Negeri yang diluluskan oleh Badan Perundangan Negeri, termasuk Ordinan Cukai Jualan Negeri. Oleh itu, hujahan pemohon harus gagal (lihat perenggan 78 & 81).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (folld)
Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
Basnol Abol & Ors v The State Government of Sarawak & other appeals [2004] 2 CLJ 553, FC (refd)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985) [2018] 4 MLJ 284, CA (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417; [2018] 4 CLJ 1, FC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)
Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612; [2015] 9 CLJ 273, FC (refd)
Malayan Banking Bhd v Charterefield Corp Sdn Bhd [2001] 3 MLJ 160, HC (refd)
Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145; [2014] 2 CLJ 525, FC (refd)
Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97, SC (refd)
QRS Brands Berhad v Suruhanjaya Sekuriti and Anor [2006] MLJU 90; [2006] 2 CLJ 532, CA (refd)
TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals [2019] 6 MLJ 141; [2019] 10 CLJ 436, FC (refd)
ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153, FC (refd)

Legislation referred to

Advocates Ordinance (Cap 2)
Advocate Ordinance (Cap 10)
Federal Constitution arts 4(3), (3)(b), (4), 73(a), (b), 74(2), (4), 95B(3), (3)(a), (3)(b), Eighth Schedule, Part I, cl 12, Ninth Schedule, List I, items 7(h), 8, 8(j), Lists II, IIA
Government Proceedings Act 1956 s 24(1)(b)
Legal Profession Act 1976
Petroleum Development Act 1974 ss 2, 2(1), 2(2), 4, 6, 6(1)
Rules of Court 2012 O 41 r 5, O 53, O 53 r 3(6)
Sale of Goods Act 1957

State Sales Tax (Taxable Goods and Rate of Tax) Order 2018
State Sales Tax Ordinance (Cap 25) ss 2, 2(a), (b), (c), (d), (e), (f), 7, 8, 9, 11(1), 12(1), (6), (7), 13(1), 15(d), 21(1), (6), 24, 62
State Sales Tax Regulation 1998 reg 19C, Form 3

Malik Imtiaz (Alvin Chong with him) (Idris, Alvin Chong & Partners) for the applicant.
JC Fong (Talat Mahmood Abdul Rashid, Saferi Ali, Nur Azhar bin Bujang and Voon Yan Sin with him) (State Federal Counsel, Sarawak State Attorney General's Chambers) for the respondents.

Azhahari Kamal J:

INTRODUCTION

[1] Pursuant to the State Sale Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018, the State Government of Sarawak ('the second respondent') imposed sales tax of 5% 'for sale or delivery to any person outside the state of Sarawak' on petroleum product specified therein effective from 1 January 2019. Pursuant to the said order, the Comptroller of State Sales Tax, Sarawak ('the first respondent') vide a notice dated 29 August 2019 ('the first notice'), adjudged and assessed sale tax payable in respect of crude petroleum oil, liquefied natural gas and condensates for the period between 1 January 2019–30 June 2019 amounting to RM1,208,100,690.49 and demanded payment thereof within 30 days from the date of the first notice. Subsequently the first respondent issued another notice dated 7 October 2019 ('second notice') adjudging and assessing the sales tax payable in respect of crude petroleum oil, liquefied natural gas and condensates for the period between 1 July 2019–31 August 2019 amounting to RM141,441,205.75 and demanded payment thereof within 30 days from the date of the second notice. Aggrieved with the said decision, the applicant now challenged the said decision by way of judicial review.

PRELIMINARY OBJECTION

[2] At the outset of the hearing of the judicial review, learned counsel for the respondents informed the court that the respondents intend to raise preliminary point on jurisdiction and proposed that the jurisdictional point on the declaratory relief to be heard first. Learned counsel for the applicant also informed the court that they are raising preliminary objection with regard to the filing of the affidavit by the state legal officer and the first respondent. I have indicated that those issues will be heard together with the substantive application and I would deal with them in this judgment. I will deal with the preliminary objection by the applicant first.

[3] The applicant raised two preliminary objections with regard to the filing of two affidavits at encls (34) and (38) by the state legal officer of the State Attorney General Chambers on the ground that the state legal officer is not empowered to affirm affidavit on behalf of the respondents; and encls (39) and (40) on the ground that they were filed in bad faith and/or abuse of process.

[4] Enclosures (34) and (38) were affirmed by Evy Liana bt Atang, a state legal officer ('the deponent'). In her affidavit, the deponent stated that she is duly authorised to make the affidavits on behalf of the respondents.

[5] Learned counsel for the applicant argued that the Government Proceeding Act 1956 ('the GPA') does not empower the state legal officer to affirm affidavit and on behalf of both the comptroller (the first respondent) and the Sarawak State Government (the second respondent).

[6] Section 24(1)(b) of the GPA provides:

> Appearance of law officer
>
> Notwithstanding any written law:
>
> (a) ...
>
> (b) in civil proceedings by or against the Government of a State a law officer, the Parliamentary Draftsman or a Federal Counsel authorized by the Legal Advisor of such State, and in the case of the State of Sabah and Sarawak, the State Attorney General or any legally qualified member of the State Attorney General's Chambers authorized by the State Attorney General for the purpose; may appear as advocate on behalf of such Government and may make and do all appearances, acts and applications in respect of such proceedings on behalf of the Government.

[7] In view of s 24(1)(b), it is the applicant's stand that the state legal officer's authority is limited to appearing as advocate and doing only such act as are necessary for that purpose. In interpreting s 24(1)(b), learned counsel applied the rule of construction involving 'dominant phase' and a 'subsidiary phase' and submitted that the phrase 'may make and do all appearances, acts and applications in respect of such proceedings on behalf of the Government' is subsidiary to the phase that precedes it ie 'may appear as advocate on behalf of such Government'. The minority judgment of David Wong CJ (Sabah and Sarawak) in the case of *TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals* [2019] 6 MLJ 141; [2019] 10 CLJ 436 was cited to support the applicant's contention that s 24(1)(b) should not be interpreted to allow a state legal officer to affirm an affidavit on behalf of the government.

[8] Section 24(1)(b) of the GPA does not state clearly whether appearance of law officer in a civil proceeding by or against the government includes the authority to affirm an affidavit. In my opinion, the purposive interpretation should be applied to determine the scope of the authority. Section 24(1)(b) clearly allows a state legal officer to represent the government in any civil proceedings in all level of courts in this country. As such they should be have equal standing with any advocates within the meaning of Sarawak Advocate Ordinance (Cap 10) (or Advocates Ordinance (Sabah) (Cap 2)) or the Legal Profession Act 1976. By necessary implication, this provision should also be interpreted in such a way that it would to enable the state legal officer to discharge duties in the best interest of the government.

[9] It is trite that a solicitor may affirm an affidavit on behalf of a litigant subject to conditions (see *Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160). In my opinion, such authority should also be extended to any state legal officer. It make no sense if they are not allowed to affirm an affidavit when a solicitor may do so. Hence, in my judgment, s 24(1)(b) of the GPA must be interpreted liberally and the phrase 'may make and do all appearances, acts and application in respect of such proceedings on behalf of the government' must include the authority to affirm an affidavit, subject to condition including that he may not affirm on any contentious matter. In the present case, I am of the opinion that the matter deposed to by the deponent are well within her personal knowledge and do not contravene the general restriction under O 41 r 5 of the Rules of Court 2012.

[10] With regard to encls (39) and (40), it was submitted that the affidavits were filed in breach of this court's direction that parties to do all that was necessary by 24 December 2019. Both encls (39) and (40) were filed on 10 January 2020 and 13 January 2020 respectively. It must be stated here that this order was made on 10 December 2019 during the ex parte hearing of the leave application. The respondents were not present.

[11] Having perused the notes of proceedings while I did make an order that parties were to do all things by 24 December 2019, there was no direction to limit the number of affidavit to be filed by the applicant and respondents. Given the serious implication of this application to the parties, it would be unjust if I were to allow this objection and to reject encls (39) and (40). In the circumstance, I overrule the preliminary objections raised by the applicant.

JURISDICTIONAL ISSUE 1

[12] It is to be noted that in this judicial review application, the relief sought by the applicant are:

(a) declaration that:

(i) the State Sales Tax Ordinance (ss 7, 8, 11(1), 12(1), (6) and/or (7) and/or 15(d);

(ii) the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order, 2018 Swk LN 239); and

(iii) reg 19C of the Sarawak State Sales Tax Regulation 1998 Swk (LN 80/98) to the extent that it allows for sale tax to be imposed on petroleum products merely with an issuance of an invoice are ultra vires the Federal Constitution and null and void;

(b) an order of certiorari to quash the notices of assessment dated 28 August 2019, 7 October 2019 and 13 November 2019 issued by the first respondent to the applicant; and

(c) an order to stay the execution or implementation of the notices of assessment dated 28 August 2019, 7 October 2019 and 13 November 2019 until the disposal of this judicial review application.

[13] Briefly, the applicant seek for a declaration on the constitutionality of the state law and regulations made thereunder and for certiorari against the act of the first respondent.

[14] It was submitted by learned counsel for the respondents that in so far as the declaratory relief is concerned, the applicant has failed to bring itself within the timeline provided for in O 53 r 3(6) of the Rules of Court 2012 which provides:

> An application for judicial review shall be made promptly and in any event within three months from the date when the ground of application first arose or when the decision is first communicated to the applicant.

[15] In this regard, the impugned State Sales Tax (Taxable Goods and Rate of Tax) Order 2018 was passed by the Majlis Mesyuarat Kerajaan Negeri (referred to as MMKN) on 13 December 2018. By this Order, petroleum products have been added as taxable goods under the State Sale Tax Ordinance. This Order was *gazetted* on 14 December 2018. On the same day the State Sales Tax (Amendment) Regulations 1998 made by the MMKN pursuant to s 62 of the State Sales Tax Ordinance was also *gazetted*. It must be noted that the impugned reg 19C, one of the subject matter of this judicial review application was added by this amendment.

[16] It was further submitted that vide letter dated 17 December 2018, from the State Financial Secretary Sarawak to the Executive Vice President and group Chief Financial Officer, the applicant was given notification on the scope of the State Sales Tax on petroleum product effective 1 January 2019.

[17] On 29 May 2019 vide letter of the even date, the first respondent notified the applicant that the applicant and its subsidiaries had to comply with the State Sales Tax Ordinance and to register themselves and to submit returns with the first respondent. Subsequently vide letter dated 1 July 2019 from the first respondent, the applicant was notified that, among others, it is a 'taxable person' undertaking the sale of petroleum product. The first respondent also notified the applicant that it has to submit return in Form 3 of the State Sales Tax Regulation 1998 and should the applicant fail to submit the return, the first respondent would assess the tax payable under s 21(1) of the State Sales Tax Ordinance which, if unpaid, will be recovered as a civil debt.

[18] It is interesting to note that vide its letter dated 26 July 2019 to the State Attorney General, the applicant had notified that:

> PETRONAS is in disagreement with Sarawak State's view on the applicability of State Sales Tax on petroleum products.

[19] The dates referred to above are pertinent as it relate to the issue of whether the applicant is within the timeline in filing this judicial review application. In this respect the issue of time line to institute judicial review application must be tied to the issue of locus standi. In the case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525 the Federal Court took the view that O 53 allows any person who was adversely affected by the decision of any public authority to apply for judicial review. In its decision, the Federal Court cited, with approval, the case of *QRS Brands Berhad v Suruhanjaya Sekuriti and Anor* [2006] MLJU 90; [2006] 2 CLJ 532 where the Court of Appeal opined that:

> (16) It is to rid this dichotomous approach which often produce injustice that Order 53 in its present form was introduced. There is a single test of threshold locus for all the remedies that are available under the order. It is that the applicant should be adversely affected.

[20] The Federal Court in *Malaysian Trade Union Congress* further held that the applicant has to show that he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[21] At the risk of repetition, it must be noted that the applicant seek to declare the state ordinance and subsidiary legislation in particular reg 19C of the Sarawak State Sale Tax Regulation 1998 null and void. The undisputed fact of the case shows that as late as first July 2019, the applicant had been notified that it classified as a 'taxable' person and has to pay State Sales Tax at the rate of 5% of the sale value of the petroleum product. Most importantly the applicant had also been notified that it has to submit the return in Form 3 of the State

Sales Tax Regulation, 1993 and would be assessed for State Sales Tax under s 21(1) of the State Sales Tax Ordinance. However, the first respondent only issued the first notice of assessment on 28 August 2019. It is the issuance of this notice that the applicant had been adversely affected by decision made by the first respondent. The passing of the 2018 order without more would not affect the applicant. Obviously the issuance of this notice of assessment had adversely affected the applicant because the applicant is now required to comply with this notice so as to avoid any civil proceedings.

[22] In my judgment, the three months' timeline should be computed from 28 August 2019 ie the date of the first notice of assessment. Hence, on 25 November 2019 when the application for leave was filed, the applicant is still within the timeline under O 53 r 3(6).

[23] Based on the above reasons, I am of the opinion that the application for judicial review is properly brought before this court.

JURISDICTIONAL ISSUE 2

[24] It is submitted by the respondent that this court do not have the jurisdiction to grant the declaration because the declaration sought by the applicant is in fact challenging the legislative power of the State to pass the State Sales Tax Ordinance and to impose sale tax on petroleum product.

[25] In this respect, the respondent brought the court's attention to the relevant paragraphs of the O 53 statement in support of this judicial review application namely:

> 28.1 The State Sales Tax Ordinance did not entitle the Respondents to issue the 2018 order as the subject of the orders, the Petroleum Products, fall within the ambit of the legislative field of 'oil' and/or 'petroleum products' within the Federal List (List I), 9th Schedule, and Federal Constitution.
>
> 28.2 The State Sales Tax Ordinance only entitles the second Respondents to impose sales tax on matters falling within the State List (List II) and Supplementary List for State of Sabah and Sarawak (List II A).
>
> 28.3 Article 95B(3), Article 112C, Item 7 Part V, 10th Schedule, Federal Constitution are understood as applying only to the Sales tax of such a nature, the power to impose sales tax by the second Respondent being exercisable within those narrow confines. Such power is intended to complement and not to be in competition with wider powers of the Federation to impose taxes.
>
> 28.4 Parliament has exclusive competence over taxation and other matters of 'trade, commerce and industry' by virtue of item 7(h) and item 8 in the Federal List.

[26] Referring to the above O 53 statement, it was suggested by learned counsel for the respondents that the applicant is challenging the competency of

the State Legislation Assembly to pass the impugned law.

[27] In response, learned counsel to the applicant submitted that, that is not the case. At p 9 of the notes of proceedings, learned counsel submitted that:

> We are not saying that Sarawak cannot make State Sales Tax laws because the constitution says the can. The question is, what does that mean? What is committed? As My Lord will see, the question of what the State sales tax as a matter of construction becomes pertinent because of the many duties and taxes that are provided for with respect to Sabah and Sarawak.

[28] It is not disputed that in the prayers for the declaration, the constitutionality of the State law and the subsidiary legislation made there under have been challenged. Hence it is pertinent to determine the scope of the declaration sought for and whether this court is the competent forum to deal with the matter.

[29] Article 4(3) of the Constitution provides:

> The validity of any law made by Parliament or the Legislative of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in the proceedings for a declaration that the law is invalid on that ground or:
>
> (a) If the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) If the law was made by the Legislature of a State, in proceedings between the Federation and that state.

[30] Further, art 4(4) of the Constitution provides:

> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in clause (3) (not being proceedings falling within paragraph (a) or (b) of the clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[31] The above provision of the constitution have been subjected to judicial interpretation as early as in 1976 in the case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, where Suffian LP held at p 113:

> Under our constitution written law may be invalid on one of these grounds:
>
> (1) In the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State Legislature has no power to make law, article 74; or

(2) In the case of both Federal and State written law, because it is inconsistent with the constitution, see article 4(1); or

(3) In the case of State written law, because it is inconsistent with Federal law, article 75.

The Court has power to declare any Federal or State law invalid on any of the above three grounds.

The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of Article 4 provides that the validity of any law made by Parliament or by State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

(a) In proceedings for declaration that the law is invalid on that ground; or

(b) If the law was made by Parliament, in proceedings between the Federation and one or more states, or

(c) If the law was made by a State Legislature, in proceedings between the Federation and that state.

...

...

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant Government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make. This jurisdiction is exclusive to the Federal Court, no other court has it. This is ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.

[32] Guided by the above judgment, the relevant issue to be considered at this juncture is whether the declaratory relief sought by the applicant herein falls within the jurisdiction of this court. In this regard, it is imperative for this court to examine the O 53 statement filed in support of this application.

[33] In contending that the issuance of the notices of assessment were illegal and ultra vires the Federal Constitution, the applicant expressly states that 'the

State Sales Tax Ordinance did not entitle the respondent to issue the 2018 order as the subject of that order, the Petroleum Product, fall within the ambit of the Legislature fields of 'oil' and/or 'Petroleum Product' within the Federal List (List 1), 9th Schedule, Federal Constitution'. A

[34] It is further contended that the State Sales Tax Ordinance only entitles the second respondent to impose sale tax on matters falling within the State List (List II) and the supplement to State List for States of Sabah and Sarawak (List IIA). B

[35] The applicant argued that Parliament has exclusive competence over taxation and other matters of 'Trade commence and industry' by virtue of item 7(h) and item 8 in the Federal List, and would necessarily include competence over into state trade and commerce. C

[36] Considering the above statements as pleaded in the O 53 statements it is clear that the basis of this judicial review applicant is founded on the fact that the impugned state law ie the State Sales Tax Ordinance has encroached its legislative perimeter by imposing the sale tax on petroleum product that falls under the Federal List. It is worth mentioning here that 'oil (and oilfield)' and 'petroleum products' are listed in item 8(j) of the Federal List (List I) of Schedule 9 of the Federal Constitution. D E

[37] Hence, it is clear that the crux of the declaratory order sought by the applicant goes directly to challenge the power of the State Legislature in passing the impugned section of the State Sales Tax Ordinance. This challenge falls under art 4(3)(b) of the Federal Constitution and pursuant to cl (4) of art 4, such challenge must be commenced with the leave of the judge of the Federal Court. However, the applicant did not obtain such leave before commencing this application. F G

[38] Consequently, I rule that this court has no jurisdiction to grant the declaration sought for.

[39] Another issue that arises from the above finding is, in so far as the declaratory relief is concerned, whether the applicant has named the correct party. It is not disputed that the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 and reg 19C of the Sarawak State Sales Tax Regulations 1998 were made by the Majlis Mesyuarat Kerajaan Negeri ('MMKN'). Hence the MMKN was the decision maker for the purpose of this relief. The fact that the MMKN is a separate entity has been decided in the case of *Basnol Abol & Ors v The State Government of Sarawak & other appeals* [2004] 2 CLJ 553 where it was held, among others, the MMKN is a separate entity from the state government. The state government is not synonymous with the H I

A MMKN hence, the failure of the applicant to name MMKN in this judicial review means that the correct decision maker is not before this court. This failure is fatal to the applicant's case and the declaratory orders sought for should be dismissed.

B SUBSTANTIVE APPLICATION: DECLARATION

[40] In the event that I am wrong in my finding on the jurisdictional point, I will now deal with the substantive application.

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[41] In so far as the State Sales Tax Ordinance is concerned, the applicant contended that the 2018 order is ultra vires the Federal Constitution as the subject matter of the said order ie petroleum product, falls within the Federal List (List I), Ninth Schedule of the Federal Constitution. The applicant took the view that taxation is a federal matter under, hence, by virtue of art 95B(3) of the Federal Constitution, the competency of the State Legislature to impose sale tax must be limited to the subject matter falling within the state list. Further, it was submitted that the Stage Legislature is not empowered to enact law having extra territorial effect as provided under art 73(a) of the Federal Constitution. The applicant then went at length to discuss the mechanic of the financial scheme of the Federation including the meaning of taxes in item 7(h), Federal List.

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[42] Put in the nutshell, the applicant is suggesting that State Legislature of Sarawak is not empowered to make the impugned section of the State Sales Tax Ordinance as it relates to matters listed under the Federal List. In other words, the applicant contended that the impugned provisions of the State Sales Tax Ordinance contravene the condition and restriction imposed by the Federal Constitution and as such are not valid in law in imposing taxed other than state sale tax under art 95B(3).

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[43] The main issue to be addressed now is whether the State Legislative of Sarawak is empowered to impose sale tax on petroleum product as envisaged by the impugned section of the State Sales Tax Ordinance. Hence it is pertinent to consider the constitutional provision on the power of the State Legislature.

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[44] It is settled that the provisions of the constitution must be considered as a whole and not in isolation (see *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153). It must also be construed 'generously and not rigidly pedantically (*Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29). The constitution must be interpreted in the light of its historical and philosophical context as well as its fundamental principles (*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1

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MLJ 545; [2018] 3 CLJ 145).

[45] It is also said that a liberal approach in construing the constitution is to give creative and purposive interpretation of the constitution with insight into social values and with supplement of adaptation to changing needs.

[46] Hence, in the context of Sabah and Sarawak and in particular pertaining to art 95B(3), the court must not lose sight of the events that took place before the formation of Malaysia on 16 September 1963. The idea of the formation of the new Federation has raised mixed reaction from the people of Sarawak. One such reaction is best illustrated by the speech of Temenggong Oyong Lawai Jau where he stated that Sarawak was not ready for the plan. He said:

> I see Malaya like a fruit garden, a garden already flourishing, with ripened fruit and ready for eating. Furthermore this garden is fenced round securely, with a fence made of belian. On the other hand what can I say about Sarawak? If Tunku could only see for himself he would see how small the garden is, how freshly planted it is, not yet fully mature, not yet firmly established. He would see that it has a fence indeed but only a shaky one, one made of bamboo. ... What happens to the garden when you try to plant trees and shrubs under big trees? They are simple eclipsed by the shadow of big trees ... and never bear fruit. (*Deals, Datus and Dayaks Sarawak and Brunei in the Making of Malaysia* by Michael Leigh, page 16, publisher: Strategic Information and Research Development Centre).

[47] In view of such reservations among the people of Sarawak, the Cobbold Commission was set up for the purpose of hearing the representation from the representative of the people of Sarawak concerning the formation of Malaysia. An Inter-Governmental Committee was then established to seek the views of the people of Sarawak, North Borneo (now Sabah) and Brunei on this matter. After a series of engagements with the representatives of these states, the Committee had issued a very detailed recommendation that form the basis of the formation of Malaysia. In so far as the revenue allocation is concerned, it was recommended that 'each Borneo state should have power to impose sale tax, if it wishes, provided that any Federal sale tax would take priority over any state sale tax and provided that any discriminatory rates would not be imposed on goods of the same type but of different origin'.

[48] The above recommendation was in fact reflected in the provision of art 95B(3) of the constitution which was added by Act 26/1963 which took effect from 16 September 1963. Article 95B(3) provides:

> (3) The Legislature of the State of Sabah and Sarawak may also make laws for imposing sales taxes, and any sale tax imposed by state law in the State of Sabah and Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List; but:

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(a) there shall not in the charging or administration of State Sales Tax be any discrimination between goods of the same description according to the place in which they originate; and

(b) the charge for any Federal sales tax shall be met out of sums collected from a person liable for that tax before the charge for a State Sales Tax.

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[49] In this respect, while admitting that art 95B(3) allow the State Legislature of Sarawak to make laws for imposing of sales taxes, learned counsel for the applicant submitted that this power are subject to certain limitation in art 73(b) provides that:

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73 In exercising the legislative powers conferred on it by this constitution:

(a) ...

(b) the Legislature of the state may make laws for the whole or ay part of that state.

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Hence, learned counsel for the applicant argued that any state law do not have any extra-territorial effect.

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[50] Secondly, it was argued that in considering the legislative power of the State Legislature, the court should also consider art 74(4) which provides:

(4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

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[51] The case of *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1 was cited where at pp 437–438 (MLJ); pp 22–25 (CLJ) the Federal Court states:

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[51] The entries in the Legislative Lists are merely legislative fields or heads of an enabling character (*State of Bihar v Kameshwar* [1952] 1 SCR 889). They give 'the outline of the subject matter of legislation' (*Karnataka Bank Ltd v State of Andhra Pradesh* [2008] 2 SCC 254 and are to be regarded as 'enumeration simplex of broad categories' (*State of Rajesthan v Chawla Affidavit in Reply* 1959 SC 544).

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[54] However, the wide amplitude to be accorded to the Legislative Lists is not without limit. The rule of widest construction does not extend to matters with no rational connection to the entry.

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[55] Neither does the rule of widest construction permit the court to interpret one entry so as to override another entry to render it meaningless. In the event of apparent conflict between entries, the entries should as far as possible to be reconciled by a harmonious construction ...

[52] Based on the above reasons, learned counsel for the applicant suggested that the power of the State Legislature to make law imposing sale tax must be limited in a narrow sense of tax on the retail sale of good only in respect of the sale of subject matter within the state list.

[53] As mentioned earlier, art 95B(3) was introduced as for the purpose of addressing the concerns of the people of Sarawak prior to the formation of Malaysia, including its financial capabilities, and it formed the constitutional guarantee for the people of Sabah and Sarawak. Hence, this legislative history must be taken into consideration in interpreting this provision.

[54] Article 95B(3) clearly state that the State Legislature is empowered to make law for imposing rules taxes subject to two conditions in paras (a) and (b) namely:

(a) there shall not in the charging or administration of a State sales tax be any discrimination between goods of the same description according to the place in which they originate and

(b) the charge for any Federal sale tax shall be met out of sums collected from a person liable for that tax before the charge for a State Sales Tax.

[55] In my opinion the phrase 'and any sale tax imposed by state law in the State of Sabah or Sarawak shall be deemed to be among the matters enumerated in the State List and not in the Federal List' in art 95B(3) must be interpreted to mean that the imposition of any sale tax itself shall be deemed to be the matter within the power of the State of Sabah and Sarawak under the State list ie List II of the Ninth Schedule of the Federal Constitution.

[56] Further, and by way of comparison, art 74(2) that spells out the legislative power of the state legislature used the words 'without prejudice to any power conferred on it by any other Article' which necessarily means that art 74(2) does not limit the power of the States of Sabah and Sarawak in art 95B(3).

[57] Hence, in my opinion the power of the State of Sabah and Sarawak under art 95B(3) is independent of the limitation under art 74(2). The power of the two states to make law imposing sales tax is only subjected to the restriction as provided under paras (a) and (b) of art 95B(3). This interpretation is consistent with historical background leading to the introduction of art 95B(3) on 16 September 1963. As recommended by the IGC report and in introducing art 95B(3) Parliament must have acknowledge the restriction on the state legislative power under art 74(2). The power of the State Legislature of Sabah and Sarawak to make law imposing sale tax is not

meant to be confined to the matters enumerated in the state list. This interpretation would bring harmony between those two articles of the Federal Constitution.

[58] As such, the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No 2) Order 2018 is constitutional and valid.

[59] The applicant also seek for a declaration that ss 2, 7, 8, 11(1), 12(1), (6) and/or (7) and/or 15(d) of the State Sales Tax Ordinance 1998 (Chapter 25) are ultra vires the Federal Constitution and null and void.

[60] It is the applicant's case that the definition of sale under the impugned section of the State Sales Tax Ordinance must have three element namely:

(a) there must be an agreement between the parties for the purpose of transferring title to the goods;

(b) it must be supported by money consideration; and

(c) as a result of the transaction, property must actually pass in the goods.

[61] It was further argued that the definition of sale must have the elements of the sale of goods under the Sale of Goods Act 1957. Hence, it was contended by the applicant that the definition of sale in the State Sales Tax Ordinance unconstitutional.

[62] As submitted by learned counsel for the respondent, the definition of the word 'sale' is not provided for under the Federal Constitution. However, since art 95B(3) has empowered the State Legislature to pass law imposing the sale tax, regard must also be had to cl 12, Part I of the Eighth Schedule of the Federal Constitution which stipulates that:

> 12 No tax or rate shall be levied by or for the purpose of the State except by or under the authority of law.

[63] In my opinion the power of the State Legislation to enact the State Sales Tax Ordinance comes with the power to make provisions to spell out the mechanism upon which that law may be implemented. This would include the power to in define the word 'sale' or stipulating the date when the sale tax is due or when the sale takes place. All this would enable the State to exercise its power within the authority of the law.

[64] Hence, the definition of 'sale' under the State Sales Tax Ordinance can be found in s 2 which provides:

'sale' means the sale and disposal of taxable goods and the supply of taxable services, and in relation to goods, includes:

(a) the disposal of taxable good with the right of purchase or on terms providing that the seller retains interest in such taxable goods;

(b) the delivery of taxable goods under any condition as to future payment;

(c) the export of taxable goods for sale or delivery to any person outside the state except for the personal use of the person exporting the same;

(d) the distribution, selling or supply of any taxable goods imported or conveyed into the state for re-sale, retail or re distribution; and

(e) transactions, in whatever form, involving betting, sweepstake, lotteries or gaining and 'to sell' has a corresponding meaning.

[65] From the above definition, 'sale' under the State Sales Tax Ordinance means the sale and disposal of taxable goods including the matters provided for in paras (a)–(f). In the absence of the definition of sale under the constitution, the extended meaning of the word 'sale' (see *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2015] 6 MLJ 612 at pp 628–629; [2015] 9 CLJ 273 at p 291) found in s 2 has the force of law. There is no basis for this court to rule that the definition is unconstitutional.

SUBSTANTIVE APPLICATION: CERTIORARI

[66] I will now deal with the applicant's application for an order of certiorari.

[67] Learned counsel for the applicant had summarised the grounds for challenging the first respondent's decision as follows:

(a) the applicant is not a taxable person as it does not carry out any activities within Sarawak of the nature that would allow for sale to be imposed under the SSTO read together with the 2018 Order and Sarawak State Sales Tax Regulation. The applicant contends that the notices of assessment are ultra vires the State Sales Tax Ordinance;

(b) the first respondent has no legal basis to issue the notices of assessment as the 2018 Order is not valid in law;

(c) the material provision of the State Sales Tax Ordinance relevant to the issuance of the notices of assessment are unconstitutional for allowing the imposition of sales tax on transaction that are not 'sales' in law;

(d) the first respondent did not have any proper factual basis for the assessment underlying the said notices with the consequence that the first respondent had acted illegally, irrationally and/or unreasonably. Further, the notices were excessive and disproportionate;

(e) the issuance of the notices of assessment contravened the applicant's legitimate expectation; and

(f) the first respondent had issued the notices of assessment in bad faith.

[68] Learned counsel for the applicant submitted at length in his attempt to prove the above issues. A string of cases including *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2015] 6 MLJ 612; [2015] 9 CLJ 273 and *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)* [2018] 4 MLJ 284 were cited to support his submission.

[69] Since I have ruled that the State Sales Tax Ordinance is constitutional, I will only examine the act of the first respondent in issuing the notices of assessment to the applicant and to determine whether there is any basis for judicial review. It must be noted that as at 28 August 2019 when the first notice was issued, there is no challenge on the legality of the State Sales Tax Ordinance and the 2018 Order. As on that date, the said 2018 Order, upon which the notice was issued, shall be presumed valid unless otherwise ordered by the court (see *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97).

[70] In the circumstances, the notices issued by the first respondent are made under a valid state law. What remain to be determined now is whether the acts of the first respondent are irrational, unreasonable or disproportionate.

[71] From the affidavit in opposition (II) affirmed by Hajah Elean bt Masa'at on 10 January 2020 filed in this application, the following facts have been established:

(a) the Executive Vice President and Group Financial officer of the applicant had requested that the notices of assessment be sent to him and he would accept them on behalf of all companies within the applicant's group (affidavit in opposition encl 39);

(b) the applicant considered itself not a taxable person under s 9 of the SSTO and did not want to submit any return to the first respondent;

(c) the notices of assessment were issued on the basis that the applicant by itself and/or through its subsidiaries were involved in the sale of petroleum product in Sarawak;

(d) petroleum products listed in the notices of assessment were declared to be 'taxable goods' in the 2018 Order made pursuant to the powers conferred on the MMKN by s 13(1) which was *gazetted* on

14 December 2018 and came into force on 1 January 2019;

(e) the first respondent made the computation of the SST in the notices of assessment to the best of her judgment since there was no return made to her by the applicant as required by s 24 of the SSTO;

(f) the applicant had shipped liquefied natural gas (LNG) and condensates through Bintulu Port. Crude oil and condensates were shipped out of Miri Port from Miri Crude Oil Terminal;

(g) official data were obtained from Bintulu Port and Miri Port on the volume of the respective type of petroleum products shipped out of the respective ports;

(h) the computation of the sales tax was made based on the market prices for petroleum according to 'Trend of the price of sport; LNG and Data Brent Daily Price' on fob value of the petroleum sold;

(i) as stated in the notices of assessment, the first respondent reserved the right to make supplementary assessment under s 21(6) should she have further information relating to the volume of the petroleum sold or the market price or sale value should be higher or lower that the data used to make the computation;

(j) based on the annual report of the applicant for year 2018, the applicant and its agents were involved in the sale of oil and gas product and export thereof. The shipment of petroleum product from Sarawak takes place at Bintulu Port and Miri Port within Sarawak. The title to the petroleum and the risks over the same takes place when the petroleum products are loaded onto the vessel at the said ports and that is when the sale thereof takes place; and

(k) since 2018 Order came into force, eight companies had registered as taxable person involved in the sales of petroleum product declared as taxable goods and six of the companies have been paying State Sales Tax Ordinance.

[72] The above evidence shows that the applicant had from the very beginning took a stand that it is not a taxable person under the State Sales Tax Ordinance and had failed to send the return for the purpose of computation of the SST by the first respondent. In the circumstances, it is not unreasonable to infer that the first respondent is constrained to make her own judgment on the tax payable, based on the data at her disposal. In my opinion, the first respondent had shown that the amount of tax payable imposed on the applicant is not arbitrary. It was based on reliable data from the port in Bintulu and Miri. Most importantly, the first respondent had made it clear that it

would make supplementary assessment under s 21(6) of the State Sales Tax Ordinance. In fact, the applicant had not made any protest on the issuance of the notices.

[73] In the circumstances, the allegation that the first respondent's act was tainted with irrationality, unreasonableness and illegality is not proven. Further, there is also no mala fide on the part of the respondents in issuing the notices.

[74] I will now deal with the issue of legitimate expectation and special status of Petronas. It is the applicant's case that the issue of legitimate expectation and its special status derive from the introduction of the Petroleum Development Act 1974 ('the PDA') and the vesting instrument executed by the Sarawak State Government pursuant to s 2(2) of the PDA and the Cash Payment Agreement 1975 between the federal government and the state government.

[75] In essence, the applicant contended that under s 2(1) of the PDA, the entire ownership in, and the exclusive rights, powers liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in them. In return, s 4 of the PDA provides that the applicant makes cash payment to the state government as may be agreed by the parties concerned. It was and submitted that from 1975–2018, when the State Sales Tax Ordinance came into effect, the Sarawak State Government did not impose any sales tax on the petroleum product. Hence, by conduct, the Sarawak Government had represented that no such tax would be payable. This gives rise to an implied representation which is recognised by law as being a basis for legitimate expectation.

[76] In response, learned counsel for the respondents argued that the PDA is an expropriation or compulsory acquisition of petroleum by Parliament without provision for adequate compensation. Further, it is also argued that the vesting Instrument does not provide for any consideration for the 'grant in perpetuity and conveyance and vesting' of ownership of the petroleum onshore and offshore of Sarawak to the applicant. Based on the aforesaid reasons, the respondent submitted that the 'vesting Instrument has no constitutional nor statutory authority making it ineffective, null and void and it should not be a valid ground to claim that the applicant is exempted from the 2018 Order and from paying the sales tax.

[77] I am not prepared to rule on the validity of the vesting Instrument at this proceeding because it is not the subject matter of the JR application. Nevertheless, the position taken by the applicant on this issue is based on the premise that by virtue of the PDA, the entire ownership in and the exclusive

rights, powers liberties and privileges of exploring, exploiting, winning and obtaining petroleum, onshore and offshore of Malaysia shall be vested in them. Impliedly, it was the contention that their rights under s 2(1) is absolute and since no sales tax was ever imposed on them prior to 2018, they are entitled to expect that no such tax would be legally imposed on them.

[78] However, insofar as the ownership of petroleum in Sarawak is concerned, there is no express provision in the PDA that the applicant is exempted from complying with any written law including state law.

[79] As pointed out by learned counsel for the respondent, unlike s 2 of the PDA (ie ownership), s 6 of the PDA (ie for downstream operation) employed the word 'notwithstanding the provision of any other written law', thus implying that the applicant's right under the PDA is absolute. For completeness, s 6(1) reads:

> 6(1) Notwithstanding the provision of any other written law, no business of processing or refining of petroleum or manufacturing of petro-chemical product from petroleum, may be carried out by any person other than PETRONAS unless there is in respect of any such business a permission given by the Prime Minister.

[80] There is no such words appear in s 2(1) which reads:

> 2(1) The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a Corporation to be incorporated under the Companies Act 1965 or under any law relating to incorporation of companies.

[81] In my opinion, while s 6(1) gives the Prime Minister an absolute right in determining the downstream activities of the applicant, the same cannot be said with regards to the ownership etc. of petroleum under s 2(1). Hence, it is my finding that it is not the intention of the Parliament to accord the applicant with any special status in relation to its operation in Sarawak.

Its ownership on petroleum under s 2 of the PDA is not without qualification and they are bound by any State law passed by the State Legislature, including the State Sales Tax Ordinance. As such, the applicant's contention must fail.

CONCLUSION

[82] Based on the above reasons, I dismiss this application with costs of RM50,000 subject to paymeny of allocator fee.

Application dismissed with costs of RM50,000 subject to payment of allocator fee.

Reported by Mohd Kamarul Anwar